

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD ANTOINE HARDRICK,

Defendant-Appellant.

UNPUBLISHED

February 26, 2008

No. 271832

Wayne Circuit Court

LC No. 05-012272-01

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of three to 15 years for carjacking and armed robbery, and to a consecutive two-year term for felony-firearm. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that trial counsel provided ineffective assistance by failing to excuse two robbery victims from the jury and by failing to present defendant or any other witness for the defense. We disagree.

A trial court's findings of fact regarding a claim of ineffective assistance of counsel are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was deficient, and (2) a reasonable probability exists that but for the deficient performance the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). In this regard, there is a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 600.

With regard to trial counsel's failure to excuse two jurors who indicated they had been robbery victims, defendant acknowledges that one of the jurors was eventually removed from the jury by random draw. Thus, there is clearly no reasonable probability that trial counsel's failure to excuse that juror affected the outcome of the proceeding. As to the other juror, trial counsel testified at the evidentiary hearing that he left her on the jury because he thought she would be

fair and impartial. Counsel noted that in Wayne County, crime victims routinely appeared as members of jury panels. “A lawyer’s hunches, based on his observations, may be as valid as any method of choosing a jury.” *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). This Court has stated that it found no Michigan case in which defense counsel’s failure to challenge a juror was held to be ineffective assistance of counsel, and “[w]e cannot imagine a case where a court would so hold.” *Id.* Thus, defendant has not established a claim of ineffective assistance of counsel based on trial counsel’s failure to seek removal of the relevant juror. Trial counsel’s decision was within the strong presumption of sound trial strategy. *Carbin, supra* at 600.

The only witness presented by defendant at the evidentiary hearing on remand, other than trial counsel, was defendant himself. Thus, defendant has failed to meet his burden of establishing the factual predicate for a claim that anyone other than defendant should have been called as a defense witness. *Id.*

As to trial counsel’s failure to call defendant himself to testify at trial, a review of the record indicates that there is no reasonable probability, *id.* at 599-600, that calling defendant as a witness would have changed the outcome of the trial. Given that the victim identified defendant as one of the robbers, and that police officers’ testimony tied defendant to the cellular phone used in connection with the incident, there is no reasonable probability that testimony from defendant attempting to deny that he was at the location would have been credited by the jury. In this regard, it is apparent that defendant has not disputed that the robbery occurred but rather effectively claimed that he was not at the location of the robbery. However, with the evidence regarding the cellular phone, it is highly implausible for defendant to make this claim.

Defendant also argues that due to trial counsel’s failure to adequately prepare for the preliminary examination, defendant wore clothes to the proceeding that, according to the victim, were those worn on the night of the crime, and that this contributed to the victim’s identification of defendant as the perpetrator. This argument is not properly presented because it is outside the scope of defendant’s statement of the question presented on appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Regardless, in light of the strong evidence of guilt, there is no reasonable probability, *Carbin, supra* at 599-600, that any failure by trial counsel to adequately prepare for the preliminary examination affected the outcome of the trial.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Alton T. Davis